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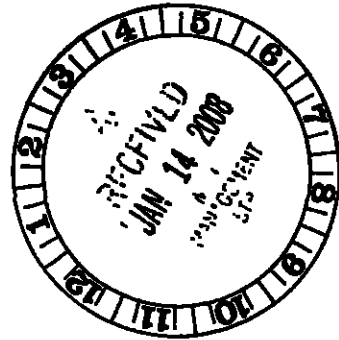
KARL MORELL

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JAN 14 2008  
SURFACE  
TRANSPORTATION BOARD

kmorell@dc.bjllp.com

January 14, 2008

22/268



BY HAND DELIVERY

The Honorable Anne K Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E Street, S W  
Washington, DC 20423-001

Re: STB Docket No AB-6 (Sub-No. 462X), BNSF Railway Company –  
Discontinuance Exemption – In Cook County, IL

Dear Acting Secretary Quinlan

Attached for filing are the original and ten copies of a Petition for  
Exemption under 49 U S C § 10502 Also attached is a check covering the \$5,400  
filing fee.

Please time and date stamp the extra copy of the Petition and return it  
with our messenger

If you have any questions, please call me

Sincerely,

Karl Morell

ENTERED  
Office of Proceedings  
JAN 15 2008  
Part of  
Public Record

Enclosures

**FILED**  
JAN 14 2008  
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**FILED**

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BEFORE THE

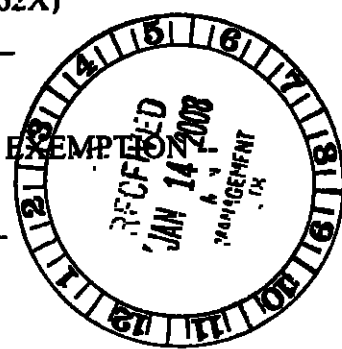
SURFACE TRANSPORTATION BOARD

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STB DOCKET NO AB-6 (SUB-NO. 462X)

BNSF RAILWAY COMPANY  
-- DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION  
IN COOK COUNTY, ILLINOIS

PETITION FOR EXEMPTION



ENTERED  
Office of Proceedings  
JAN 15 2008  
Part of  
Public Record

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Attorneys for  
BNSF Railway Company

Dated January 14, 2008

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**BEFORE THE**  
**SURFACE TRANSPORTATION BOARD**

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**STB DOCKET NO. AB-6 (SUB-NO. 462X)**

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**BNSF RAILWAY COMPANY**  
**-- DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION --**  
**IN COOK COUNTY, ILLINOIS**

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**PETITION FOR EXEMPTION**

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BNSF Railway Company ("BNSF") petitions the Surface Transportation Board ("STB" or "Board") to exempt, under 49 U.S.C. § 10502, from the prior approval requirements of 49 U.S.C. § 10903, BNSF's discontinuance of overhead trackage rights over a 17.8-mile rail line owned by Illinois Central Railroad Company ("IC") and located in Cook County, Illinois.

**PROPOSED TRANSACTION**

BNSF proposes to discontinue its overhead trackage rights over the IC rail line located between milepost 17, at Chicago, and milepost 19.5, at Harvey, in Cook County, Illinois (the "Line"). The Line traverses U.S. Postal Service Zip Codes 60426, 60605, 60609, 60615, 60616, 60620, 60621, 60643, and 60653. A map of the Line is attached as Exhibit A.

Based on information in BNSF's possession, the Line does not contain any federally granted right-of-way. Any documentation in BNSF's possession will be made available to those requesting it.

## STATEMENT OF FACTS

BNSF acquired the overhead trackage rights in 1999 *See* STB Finance Docket No 33765, *The Burlington Northern and Santa Fe Railway Company – Trackage Rights Exemption – Illinois Central Railroad Company* (not printed), served June 23, 1999.<sup>1</sup> Pursuant to a trackage rights Agreement dated June 7, 1999, IC, a wholly owned subsidiary of Canadian National Railway Company (“CN”), agreed to grant BNSF overhead trackage rights over the Line. The purpose of the overhead trackage rights was solely to enable BNSF, using its own trains with its own crews, to interchange unit coal trains with Grand Trunk Western Railroad (“GTW”), also a wholly owned subsidiary of CN, at GTW’s connection with IC at Harvey.

On November 26, 2007, IC and BNSF entered into an Interchange Agreement which governs the interchange of certain traffic between BNSF and CN in Chicago and in Harvey.<sup>2</sup> The Interchange Agreement fully supersedes and terminates the 1999 trackage rights Agreement and expressly requires BNSF to discontinue its trackage rights.

## EXEMPTION REQUESTED

A rail carrier may not discontinue trackage rights operations without the prior approval of the Board. 49 U.S.C. § 10903(d); *see also Thompson v Texas Mexican Ry Co*, 328 U S 134 (1946).

Under 49 U.S.C. § 10502, however, the Board must exempt a transaction from regulation when it finds that

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<sup>1</sup> The Board’s 1999 decision identifies the length of the Line as 17.6 miles. The Line is actually 17.8 miles in length.

<sup>2</sup> The Interchange Agreement does not require prior Board approval. *See Black v ICC*, 837 F.2d 1175, 1178 (D.C. Cir. 1988); *Southern Ry Co – Control – Central of Georgia Ry*, 317 I.C.C. 557, 583 (1962).

(1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and

(2) either.

(a) the transaction is of limited scope; or

(b) regulation is not necessary to protect shippers from the abuse of market power.

The legislative history of Section 10502 reveals a clear Congressional intent that the STB should liberally use its exemption authority to free certain transactions from the administrative and financial costs associated with continued regulation. In enacting the Staggers Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, Congress encouraged the STB's predecessor to liberally use the expanded exemption authority under former Section 10505.

The policy underlying this provision is that while Congress has been able to identify broad areas of commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress. The conferees expect that, consistent with the policies of this Act, the Commission will pursue partial and complete exemption from remaining regulation.

H. R. Rep. No. 1430, 96<sup>th</sup> Cong. 2d Sess. 105 (1980). *See also Exemption From Regulation – Boxcar Traffic*, 367 I.C.C. 424, 428 (1983), *vacated and remanded on other grounds. Brae Corp v. United States*, 740 F.2d 1023 (D.C. Cir. 1984). Congress reaffirmed this policy in the conference report accompanying the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, which re-enacted the rail exemption provisions as Section 10502. H. R. Rep. 422, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 168-69 (1995).

**A. The Application Of 49 U.S.C. § 10903 Is Not Necessary to Carry Out The Rail Transportation Policy**

Detailed scrutiny of this transaction is not necessary to carry out the rail transportation policy. An exemption would minimize the unnecessary expenses associated with the filing of a formal discontinuance application and expedite regulatory decisions [49 U.S.C. § 10101(2)] *See, e.g., Norfolk & W Ry Co – Abandonment Exem. – Cinn., Hamilton County, OH*, 3 S.T.B. 110 (1998); STB Docket No. AB-367 (Sub-No. 2X), *Georgia Central Railroad, L.P. – Abandonment Exemption – In Chatham County, GA* (not printed), served September 17, 1997 (“*Georgia Central*”). In discontinuing its trackage rights operations over the Line, BNSF will be able to continue interchanging the same traffic with CN pursuant to the new Interchange Agreement. Granting the exemption will thus foster sound economic conditions and encourage efficient management. 49 U.S.C. § 10101(5) and (9). *See, e.g.,* STB Docket No. AB-318 (Sub-No. 4X), *Louisiana & Delta Railroad, Inc. – Abandonment Exemption – In Lafourche and Assumption Parishes, LA* (not printed), served August 26, 1997; STB Docket No. AB-497 (Sub-No. 1X), *Minnesota Northern Railroad, Inc. – Abandonment Exemption – In Red Lake and Polk Counties, MN* (not printed), served November 14, 1997. Other aspects of the rail transportation policy are not affected adversely. For example, competition and the continuation of a sound rail transportation system are not affected since BNSF does not serve any shippers on the Line and the overhead traffic will continue to be interchanged by BNSF and CN in an efficient and economic manner.

Where, as here, the trackage rights are simply overhead and no local service is affected, the Board and its predecessor, the Interstate Commerce Commission (“ICC”), have consistently held that formal regulation of the discontinuance is not necessary to carry out the rail transportation policy. *See, e.g.,* Docket No. AB-102 (Sub-No. 25X), *Missouri-Kansas-Texas R*

*Co – Exemption – Discontinuance of Trackage Rights in Labette and Cherokee Counties, KS* (not printed), served February 9, 1990. This is particularly true where, as here, the carrier discontinuing the overhead trackage rights is able to continue providing the same service only under another arrangement. See Docket No. AB-6 (Sub-No 347X), *Burlington Northern R Co – Abandonment and Discontinuance of Trackage Rights Exemption – In Greene, Sumter, Choctow, Washington and Mobile, AL* (not printed), served July 6, 1993, Docket No AB-6 (Sub-No 340X), *Burlington Northern R. Co – Discontinuance of Trackage Rights Exemption – Between East Dubuque, IL and Dubuque, IA* (not printed), served September 1, 1992 (“*Dubuque Discontinuance*”).

**B. This Transaction Is Of Limited Scope**

In determining whether a proposed transaction is of limited scope, the Board considers a variety of factors, such as the length of the rail line, the number of shippers on the line and the traffic volume. See, e g , Docket No AB-347 (Sub-No. 1X), *Florida West Coast Railroad Company – Abandonment Exemption – Gilchrist and Levy Counties, FL* (not printed), served January 16, 1992; Docket No. AB-6 (Sub-No. 349X), *Burlington Northern Railroad Company – Abandonment Exemption – In Greene and Polk Counties, MO* (not printed), served August 27, 1993

The proposed transaction is clearly of limited scope. BNSF is seeking to discontinue overhead trackage rights over a 17 8-mile rail line Moreover, BNSF is unable to serve any shippers located on the Line given the nature of the trackage rights The shortness of the Line, the limited geographic area involved, and the lack of ability to provide local service demonstrate the limited scope of the proposed discontinuance See, e.g. , Docket No. AB-397 (Sub-No 3X), *Tulare Valley Railroad Company – Abandonment Exemption – In Tulare And Fresno Counties,*

CA (not printed), served February 9, 1995, Finance Docket No. 31088 and Docket No. AB-43 (Sub-No 148X), *Southern Ry Co and Norfolk Southern Corp – Purchase – Illinois Central R Co Line between Fulton, KY and Haleyville, AL – And Trackage Rights – Illinois Central R Co Line between Fulton, KY and Centralia, IL* (not printed), served May 9, 1988 (discontinuance of overhead trackage rights limited in scope).

**C. This Transaction Will Not Result In An Abuse of Market Power**

The proposed discontinuance will not reduce the number of competitive rail options available to any shipper. Because the trackage rights were overhead in nature, BNSF was not able to serve any local shippers on the Line. The overhead traffic interchanged between BNSF and CN will continue to move as before under the Interchange Agreement. Therefore, regulation is not necessary to protect shippers from an abuse of market power. *See, e g*, STB Docket No. AB-55 (Sub-No. 576) *CSX Transportation, Inc – Abandonment Exemption – In Guernsey County, OH* (not printed), served November 22, 1999; STB Docket No AB-55 (Sub-No. 563X), *CSX Transportation, Inc – Abandonment Exemption – In Harrison County, WV* (not printed), served September 25, 1998; *Georgia Central*.

The proposed discontinuance poses no threat of market power abuse by BNSF or any other carrier. *See, e g*, Docket No. AB-6 (Sub-No. 302X), *Burlington Northern R – Trackage Rights Termination and Discontinuance of Operations Exemption – In Tulsa, Wagoner, and Muskogee Counties, OK* (not printed), served December 21, 1988 (regulation not necessary to protect shippers from the abuse of market power where carrier provided overhead service only and all shippers would continue to receive service), *Dubuque Discontinuance* (regulation not necessary to protect shippers from abuse of market power where service would continue under car haulage agreement).



## **ENVIRONMENTAL AND HISTORIC REPORTING REQUIREMENTS**

This proceeding is exempt from environmental reporting requirements under 49 C.F.R. § 1105.6(c)(6) (discontinuance of trackage rights where the line will continue to be operated) and from historic reporting requirements under 49 C.F.R. § 1105.8(a) (because exempted by 49 C.F.R. § 1105.6(c)(6)). See STB Docket No. AB-156 (Sub-No. 25X), *Delaware and Hudson Railway Company, Inc. – Discontinuance of Trackage Rights – In Susquehanna County, Pa and Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie, and Genesee Counties, NY* (not printed), served January 19, 2005.

## **FEDERAL REGISTER NOTICE**

A draft Federal Register notice is attached to this Petition as Exhibit B.

## **LABOR PROTECTION**

The interests of railroad employees who may be adversely affected by the proposed discontinuance will be adequately protected by the labor protection conditions in Oregon Short Line R. Co. – Abandonment – Goshen, 360 I.C.C. 91 (1979).

## **CONCLUSION**

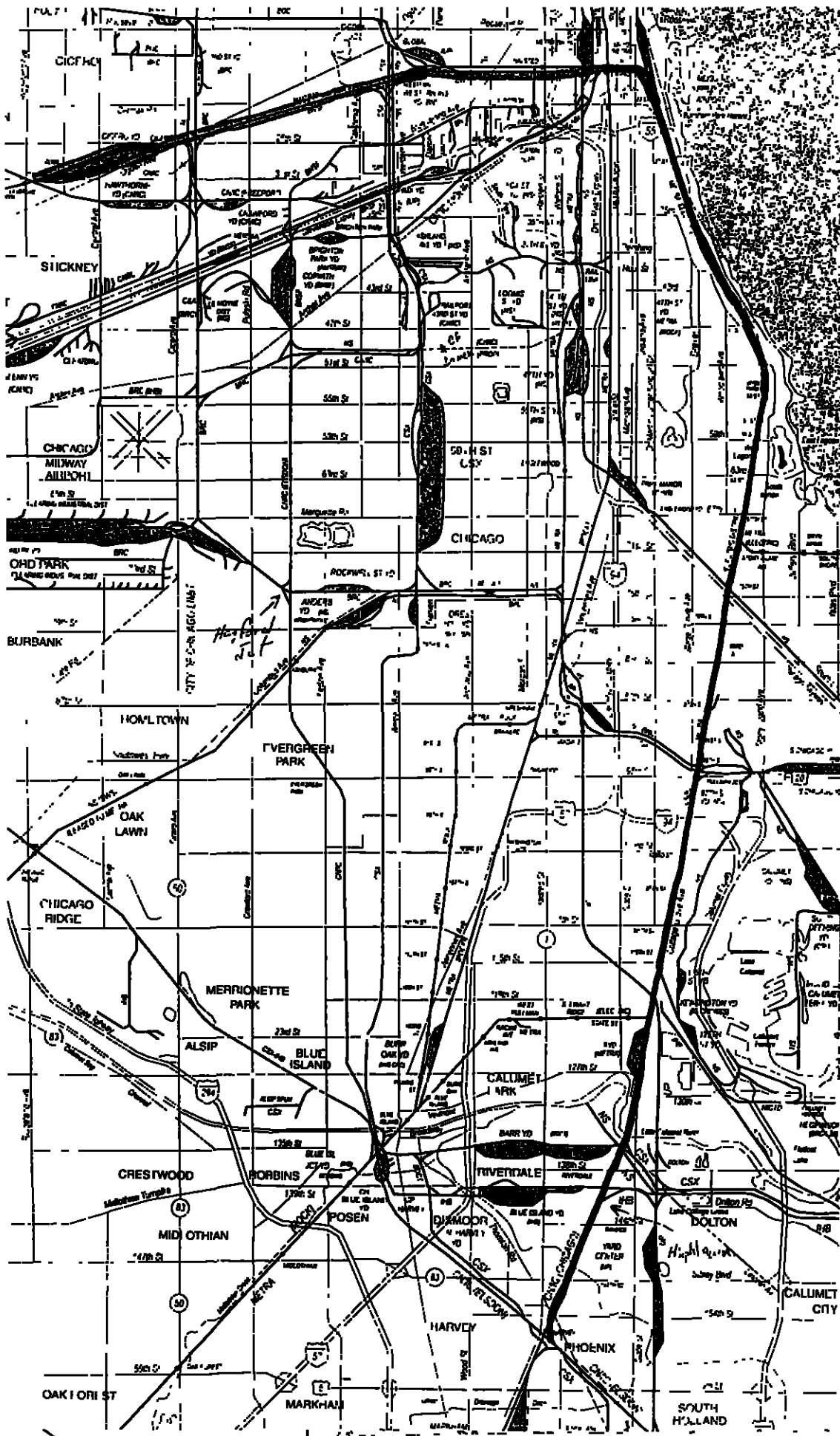
Application of the regulatory requirements and procedures of 49 U.S.C. § 10903 is not required to carry out the rail transportation policy set forth in 49 U.S.C. § 10101, as previously described in this Petition. Nor is STB regulation required to protect shippers from the abuse of market power. Moreover, the proposed discontinuance is of limited scope. Accordingly, BNSF respectfully urges the Board to grant the discontinuance.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Karl Morell", written over a horizontal line.

Karl Morell  
Of Counsel  
Ball Janik LLP  
1455 F Street, N.W.  
Suite 225  
Washington, D.C. 20005  
(202) 638-3307

Dated January 14, 2008



**EXHIBIT B**

**SURFACE TRANSPORTATION BOARD**

**STB DOCKET NO. AB-6 (Sub-No 462X)**

**BNSF RAILWAY COMPANY  
--DISCONTINUANCE OF TRACKAGE RIGHTS EXEMPTION--  
IN COOK COUNTY, ILLINOIS**

On January 14, 2008, BNSF Railway Company (BNSF) filed with the Surface Transportation Board (Board) a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 for BNSF to discontinue overhead trackage rights over approximately 17.8 miles of railroad line owned and operated by Illinois Central Railroad Company located between milepost 1.7, in Chicago, IL, and milepost 19.5, in Harvey, IL. The line traverses U.S. Postal Service Zip Codes 60426, 60605, 60609, 60615, 60616, 60620, 60621, 60643, and 60653 in Cook County, Illinois.

The line does not contain federally granted rights-of-way. Any documentation in the railroad's possession will be made available promptly to those requesting it.

The interests of railroad employees will be protected by the conditions set forth in Oregon Short Line R. Co. – Abandonment – Goshen, 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by April \_\_, 2008.

This proceeding is exempt from environmental reporting requirements under 49 CFR 1105.6(c) and from historic reporting requirements under 49 CFR 1105.8(b).

Any offer of financial assistance for subsidy under 49 C.F.R. 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each offer

of financial assistance must be accompanied by the filing fee, which currently is set at \$1,300.

*See* 49 C.F.R. 1002.2(f)(25)

All filings in response to this notice must refer to STB Docket No. AB-6 (Sub-No. 462X) and must be sent to. (1) Office of the Secretary, Case Control Unit, Surface Transportation Board, 395 E Street, S W , Washington, DC 20423-0001; and (2) Karl Morell, Of Counsel, Ball Janik LLP, 1455 F Street, N.W., Suite 225, Washington, DC 20005 Replies to the petition are due on or before \_\_\_\_\_, 2008

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Services at (202) 245-0230 or refer to the full discontinuance regulations at 49 C.F.R. Part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis at (202) 245-0305 [TDD for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339 ]

Board decisions and notices are available on our website at "WWW.STB DOT GOV."

Decided: \_\_\_\_\_ 2008.

By the Board, David M. Konschnik, Director, Office of Proceedings,

## CERTIFICATE OF SERVICE

I hereby certify that, on this 14<sup>th</sup> day of January, 2008, I served the foregoing Petition for Exemption to be served by first class mail, postage pre-paid on the following parties:

<b>State Public Service Commission</b>  Illinois State Clearinghouse Office of the Governor 207 Statehouse Springfield, IL 62706  Commerce Commission 527 East Capitol Avenue Springfield IL 62701  <b>Military Traffic Management Command</b>  MTMCTEA ATTN Railroads for National Defense 720 Thimble Shoals Blvd., Suite 130 Newport News, VA 23606-2574	<b>National Park Service</b>  Chief of National Recreation and Trails U S Dept. of Interior - Nat'l Park Service Recreation Resources Assistance Division 1849 C Street, NW Washington, DC 20240-0001  <b>National Park Service</b>  National Park Service 1709 Jackson Street Omaha, NE 68102  <b>U.S. Department of Agriculture</b>  U S Department of Agriculture Chief of the Forest Service 4th Floor N.W., Auditors' Building 14th St and Independence Ave., S.W Washington, DC 20250
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Karl Morell

## **CERTIFICATE OF PUBLICATION**

The undersigned hereby certifies that notice of the proposed discontinuance in STB Docket No. AB-6 (Sub-No 462X) was published on January 11, 2008, in the Daily Herald, a newspaper of general circulation in Cook County, Illinois as required by 49 C.F.R. § 1105.12.

Dated: January 14, 2008

  
Karl Morell